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JOHN T. FEY, C

IN THE

Supreme Court of the United States

October Term, 1956

No. 874

ROBERT LIVINGSTON POMEROY, Executor of the Estate of Elizabeth Eagan Pomeroy, *Petitioner*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

HYMAN SIEGLER
517 Wyatt Building
Washington 5, D. C.

EUGENE GREENMAN
1709 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner.

April 1, 1957.

Byron S. Adams, Washington, D. C.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on November 15, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia, denying respondent's motion for a judgment notwithstanding the verdict and for a new trial, is printed as Appendix A hereto and is re-

ported at 132 F. Supp. 257. The opinion of the Court of Appeals for the District of Columbia, printed as Appendix B hereto, is reported at 239 F. 2d 435.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1956. Rehearing was denied on January 2, 1957. This petition for a writ of certiorari was filed on April 1, 1957, less than 90 days after the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a decision of the Court of Appeals for the District of Columbia, incorporating the negligence standards of the Federal Employers' Liability Act into the common law of negligence of the District of Columbia, comes within the category of cases appropriate to the exercise of the certiorari jurisdiction of this Court.

2. Whether the Court of Appeals, in reversing the verdict of a jury on issues of negligence and causation, has misunderstood and misapplied decisions of this Court involving the Federal Employers' Liability Act.*

STATEMENT OF THE CASE

This case involves an action in the United States District Court for the District of Columbia for the wrongful death of a passenger on the Pennsylvania

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* If certiorari is granted in this case, petitioner reserves the right to urge that the jury's verdict can also be supported by the application of the doctrine of *res ipsa loquitur*, an issue that was argued and decided in the court below.

Railroad Co., the respondent. The deceased, Mrs. Elizabeth Eagan Pomeroy, came to her death under the following circumstances:

Eugene C. Pomeroy and his wife, the deceased, had been attending a family reunion at Hopewell, New Jersey, occasioned by the birth of a grandchild. The family gathering had been an extremely pleasant one. R. 39A-40A. Although the Pomeroys' son to whom the baby had been born, was then living in Hopewell, he and his family were going to move to Washington, D. C., and were to occupy an apartment in an apartment house owned by the decedent in which she and her husband were then living. R. 40A-42A.

The Pomeroys were returning to Washington, expecting to arrange and fix up the apartment for their son and his family. They were occupied with thoughts about this and were looking forward to both families living together in the same apartment building. The decedent was in excellent spirits and was very cheerful. R. 42A. It was on this return trip to Washington that Mrs. Pomeroy met her death.

On September 5, 1950, in the middle of the afternoon, the Pomeroys boarded a coach car at Trenton, New Jersey, on a Pennsylvania Railroad train bound for Washington, D. C. R. 39A-41A. Shortly before the train was due to arrive at Washington, the decedent asked her husband to get the bags down from the rack and told him that she was going to get a little fresh air. She walked toward the back of the car, and that was the last time that her husband saw her alive. R. 43A-44A.

The decedent's dead body was later found at the base of Railroad Signal Bridge 1338/1339; the Signal

Bridge is on the right side of the track on which the train was being operated. It is located at a point about 2.49 miles north of Union Station and 9.02 miles south of Seabrook, Maryland. R. 52A. The Signal Bridge is located on a curve of the track which is 2800 feet long and at a point where (going south) 600 feet of the curve remain before the track straightens out. The curve is a one degree, or moderate curve. R. 20A-22A. The Pennsylvania Railroad has established a speed limit of 80 miles per hour for this curve. R. 23A. The curve is banked, the outer rail being 3½ inches higher than the inner rail. R. 23A.

The deceased came to her death through the right rear door of day coach No. 1708, the coach in which the Pomeroys had been seated. R. 52A.

The vestibule doors of the coach car are split, consisting of a top and bottom half. The top half, which must be opened first before the bottom half can be opened, is operated by turning "the latch in the hook that goes in between your fingers, and you turn it to the opposite side from the way the door swings." R. 27A. To secure the top half, it must be pushed against the bulkhead which has a safety catch. The handle which opens the top half of the door is five feet above the floor. R. 35A. The top of the bottom section of the door is 36 inches above the floor. It is opened by turning a knob and is also secured by being pushed against the bulkhead. R. 27A.

The decedent, who was 69 years of age, stood about five feet, three inches in height (R. 39A, 42A), was described as normal and healthy, but "she never was a strong woman." R. 50A.

The ticket collector, who was assigned to coach 1708 in which the Pomeroys were riding and to two addi-

tional cars, and whose duties included looking to the safety of passengers, testified that shortly before the train arrived in Washington he walked through the vestibule of coach 1708 and noticed that the top half and the bottom half of the door were open. They were not secured against the bulkhead, but were swinging freely. The trap door in the vestibule floor was closed. R. 26A, 27A-28A. He shut the door and continued walking through the next coach. R. 26A. At that point, the train was at the New York Avenue bridge (R. 26A), which is beyond the point at which the decedent had fallen through the doors. R. 20A-21A.

The ticket collector testified that it was not unusual for him to find doors open between stations, that he had seen the doors open "lots of times," (R. 26A-27A) and that on this particular trip he had previously found the top parts but not the bottom parts open. R. 29A. Baltimore was the last stop before the train pulled into Washington and the train was 1½ minutes late leaving Baltimore, although it arrived in Washington on time. R. 29A. The ticket collector saw no open doors in the vestibule of the coaches to which he was assigned as the train left Baltimore. R. 30A. He inspected these cars when the train passed through Odenton, Maryland (which is about half way between Baltimore and Washington), and found none of the doors open. R. 32A. He again inspected the cars when the train passed through Seabrook, Maryland, which was slightly more than 9 miles from the point where the decedent's body was found and again did not find any doors open. R. 32A.

The ticket collector also testified that the two halves of the door opened easily and were without defect. R. 35A-36A. There was a sign in the vestibule warn-

ing passengers not to loiter on the platform while the train was in motion and there are handholds in the vestibule about 5 feet above the floor level. R. 33A-34A.

Respondent's motion for a directed verdict after the close of petitioner's case was denied. The respondent offered no evidence. The case was submitted to the jury and a verdict was thereupon rendered in the petitioner's favor in the amount of $16,708.50. The respondent filed a motion for judgment notwithstanding the verdict or for a new trial. Judge Pine, denying the motion, filed an opinion which analyzed the evidence in detail and discussed the reasons why there was sufficient evidence of negligence to go to the jury. Appendix A hereto; 132 F. Supp. 257.

The Court of Appeals, by a 2-1 vote, reversed the judgment for petitioner and remanded the case with directions to enter a judgment for respondent. Appendix B hereto; 239 F.2d 435. Petitioner's motion for rehearing was denied on January 2, 1957.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, in Declaring the Common Law of Negligence in the District of Columbia, Has Attempted to Incorporate the Negligence Standards of the Federal Employers' Liability Act. Its Decision Thus Has National Importance as a Precedent of General Application Under the Federal Employers' Liability Act

Ordinarily, of course, this Court will not issue a writ of certiorari to review a decision of the Court of Appeals for the District of Columbia which merely declares the common law of the District or which interprets or applies a statute limited to the District. *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285; *District of Columbia* v. *Pace,* 320 U.S. 698, 702. Such a decision reflects the fact that the District of Columbia courts

must of necessity act in the capacity of state courts in deciding the local or common law of the District. And, as is true of any state court decision dealing exclusively with state law, a District of Columbia decision of this type has application only within the District and hence falls outside the scope of cases which this Court ordinarily considers appropriate to its jurisdiction. See Rule 19 of this Court's Rules.

At the same time, however, this Court has always recognized that certain cases dealing with the District common or statutory law may have significance beyond the geographical confines of the District which would justify review by this Court. And since the District of Columbia courts at all times retain their federal status and since the ultimate judicial responsibility for the sound administration of justice in those courts lies with this Court, cases have been taken for review which reflect that responsibility.

Thus this Court has asserted its certiorari jurisdiction to review the propriety of a decision of the Court of Appeals for the District of Columbia reversing the action of a Deputy Compensation Commissioner granting a claim for compensation under the Longshoremen's and Harbor Workers' Act as made applicable to the District by special legislation. *Del Vecchio* v. *Bowers,* 296 U.S. 280. Review was accepted on the basis that the statute, while being considered only with respect to its special application to the District, was "national in scope, and a decision with respect to its enforcement constitutes a precedent of general application." *Ibid.,* 285. And see *United States* v. *Beach,* 324 U.S. 193, involving the application of the Mann Act to the District.

In *Best* v. *District of Columbia*, 291 U.S. 411, certiorari was granted to review important questions involved in the action of the Court of Appeals in affirming the direction of a verdict on the basis of the opening statement of plaintiff's counsel in a common law negligence action. While the controversy in the case was held to turn upon "a difference of view as to the inference to be drawn from the opening statement," *Ibid.*, 416, the controversy was apparently thought to be so important to the administration of civil justice in the District or to have such significant national implications as to warrant review by this Court. See also *Reed* v. *Allen*, 286 U.S. 191; *Aldridge* v. *United States*, 283 U.S. 308; *Washington Fidelity Nat. Ins. Co.* v. *Burton*, 287 U.S. 97; *District of Columbia* v. *Murphy*, 314 U.S. 441; *District of Columbia* v. *Thompson Co.*, 346 U.S. 100.

And likewise there is an element which elevates the instant case out of the category of strictly local law determinations. That element is the attempt by the Court of Appeals to apply Federal Employers' Liability Act standards in reversing the verdict rendered by the jury in favor of the petitioner. That court did more than merely declare the common law of negligence and causation for the District of Columbia. It held that the decisions under the Federal Employers' Liability Act have a "helpful application" to this case and that "those decisions do not lower the threshold of proof to the level claimed" by the petitioner. Had a railroad employee disappeared under circumstances similar to those in the instant case, said the court, no liability would have attached under the Federal Employers' Liability Act. Hence no liability should result in this case, the court concluded. See Appendix B hereto, p. 18a, *infra;* and 239 F. 2d at 443.

The Court of Appeals in effect announced that the Federal Employers' Liability Act standards of negligence and causation have become the standards of negligence and causation for common law actions in the District involving alleged negligence on the part of a railroad towards its passengers. Concededly, the court had the right to adopt such nation-wide statutory standards for use in the District. But in so doing, it rendered a decision which has an impact and an importance far exceeding the limits of the District of Columbia. In holding that a railroad employee could not recover under the Federal Employers' Liability Act in these circumstances, the Court of Appeals has created a precedent of value in every state and federal court in the country where such a suit might be brought under that statute. As in *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285, the court has applied to the District a statute national in scope and "a decision with respect to its enforcement constitutes a precedent of general application." Thus the decision below may appropriately be considered by this Court in the exercise of its certiorari jurisdiction.

2. The Court of Appeals, in Reversing the Verdict of the Jury, Has Misunderstood and Misapplied Decisions of This Court Involving the Federal Employers' Liability Act. The Decision Below Thus Warrants Review by This Court

The decisions of this Court under the Federal Employers' Liability Act, which the Court of Appeals below purported to follow and make applicable to District law, clearly establish that "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers* v.

Missouri Pacific R. Co., No. 28, Oct. Term, 1956, decided Feb. 25, 1957. The focal point of judicial review then becomes the reasonableness of the particular inference or conclusion drawn by the jury, which is the basic fact-finding body. Once the reasonableness of the jury's verdict has been established by reference to the evidence put before it, the appellate court's function is exhausted. *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29; *Lavender* v. *Kurn*, 327 U.S. 645. "Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear." *Lavender* v. *Kurn, supra*, 653.

The fact that the evidence may give rise to conflicting inferences and conclusions does not invalidate the jury's verdict. "The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & P.U.R. Co., supra*, 35.

And "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. . . . But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its

conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender* v. *Kurn, supra,* 653. See also *Schulz* v. *Pennsylvania R. Co.,* 350 U.S. 523; *Webb* v. *Illinois Central R. Co.,* No. 42, Oct. Term, 1956, decided Feb. 25, 1957.

The Court of Appeals in this case gave lip service to the foregoing doctrines and cases but promptly proceeded to ignore them in the process of reversing the verdict rendered by the jury. The majority of the court below speculated at great length on the inferences and conclusions flowing from the record that were inconsistent with the result reached by the jury. And rather than concentrating on the evidentiary reasonableness of the jury's conclusion, the majority merely labeled it the product of speculation and conjecture. The decedent herself or some other passenger might have opened the vestibule door, said the court; and it was quite reasonable in the majority's mind to infer that the collector did not have time to make another inspection trip during the crucial period. Hence the verdict was held to be untenable.

Such reasoning is flatly contrary to the teachings of this Court and serves to deprive petitioner of the benefits of the jury trial to which he is entitled under District law. Had the court below confined itself, as it should have, to the reasonableness of the jury's verdict, it would have discovered an ample basis in the record for the result reached. That verdict was to the effect that, under the conceded high degree of care imposed on the railroad, the respondent railroad's ticket collector had negligently failed to make an ade-

quate number of inspections of the vestibule doors and that, as a result of such negligence, the decedent had been propelled to her death through the open doors of the train as it was rounding a curve at a high rate of speed. The negligence centered around the five to nine minute interval during which the collector failed to make any examination of the vestibule doors in question and during which the fatal fall occurred.

The collector testified that at the time in question his only duties were to see to the safety of the passengers and to keep the equipment in the best possible condition. He had already completed his other duties of collecting the fares and of seeing that the passengers were properly received on board; and his only other duty of seeing to the proper discharge of the passengers when the train arrived in Washington had not yet matured. The collector also testified that he had noticed the vestibule doors open on several occasions during the trip, that they had been securely closed some nine miles before the point where the decedent's body was found, and that he noticed the doors open and swinging freely at a point a mile beyond where the body was later found. The jury obviously concluded that the collector could have and should have made another inspection of the vestibule doors during the critical period, he not having any other duties to perform at that time, and that his negligent failure to make such an inspection and close the doors was the proximate cause of the death.

There was also evidence from which the jury could conclude that the decedent fell to her death as the result of centrifugal force exerted while the train was rounding the curve at high speed and that she was propelled through the open door. The evidence

further indicated that the decedent did not have sufficient strength to open the doors herself and that the doors were already open when she went into the vestibule for fresh air.

The reasonableness of the jury's conclusion has been attested to both by the trial judge and by the dissenting judge in the Court of Appeals. In the words of the trial judge, 132 F. Supp. 257, 260; *infra*, p. 6a:

> At the time of this incident, the collection of tickets had been completed, and during the critical period here involved he had no duty other than to see to the safety of the passengers and equipment. He knew that it was not unusual to find the doors open between stations, and that the train was approaching its destination, with the inevitable movement and activity of passengers incident to preparation for arrival. Could reasonable men differ as to whether at that time he was sufficiently alert and vigilant to constitute the exercise of the highest degree of care and foresight? Could reasonable men differ as to whether, under these circumstances, with only three coaches to supervise, it was sufficient for him to content himself with the inspection at Seabrook until he announced arrival of the train in Washington? Could a reasonable man, under these circumstances, conclude that he failed to exercise the highest degree of care by not keeping closer scrutiny and check on these three coaches, by looking in on each of them, for example, during this critical period when passengers become restive? In other words, to use a colloquialism, was he sufficiently "on the job" to bespeak the highest degree of care in the minds of all reasonable men? I thought not at the end of the trial, and on further reflection, have not changed my mind.

The refusal of the Court of Appeals to search for and recognize the reasonableness of the jury's verdict under the circumstances of this case creates a compelling reason for the grant of certiorari. Otherwise the decision below will remain as a dangerous precedent for depriving other litigants who seek the remedies of the Federal Employers' Liability Act of the benefits of trial by jury. The right to a trial by jury has been described as "a basic and fundamental feature of our system of federal jurisprudence." *Jacob* v. *New York,* 315 U.S. 752. Whether the jury be viewed in relation to Federal Employers' Liability Act proceedings or in relation to proceedings like the instant one where the statutory standards have been made applicable, the jury has been chosen as the appropriate tribunal for resolving issues of reasonable care and cause and effect. Its verdict must be respected whenever possible if the concept of the jury trial is to be maintained in full bloom.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

HYMAN SMOLLAR
517 Wyatt Building
Washington 5, D. C.

EUGENE GRESSMAN
1700 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner.

April 1, 1957.

APPENDIX

APPENDIX

APPENDIX A

Opinion of District Court

Robert Livingston Pomeroy, executor of the estate of his deceased wife, Elizabeth Eagan Pomeroy, sued the Pennsylvania Railroad Company for damages on account of her death by wrongful act (Sec. 16-1201 et seq., D. C. Code 1951). After verdict for plaintiff, defendant moved for a judgment notwithstanding the verdict or in the alternative for a new trial, and these are the motions presently before me.

At the trial, plaintiff called three witnesses. Defendant called none, and stood on its motion for a directed verdict. Plaintiff's three witnesses were a draftsman employed by defendant, a former employee of defendant, and the plaintiff. From their testimony and stipulation of counsel, the facts may be summarized as follows:

After attending a happy family reunion in connection with the birth of a grandchild, Mr. and Mrs. Pomeroy boarded a train operated by defendant at Trenton, New Jersey. Its destination was Washington, D. C., where the Pomeroys resided. They took seats in a coach car in this train. They had planned to have dinner at the Union Station on arrival in Washington. At the time, Mr. and Mrs. Pomeroy were each 69 years of age. Mrs. Pomeroy was in good health, though frail, and in excellent spirits. She was about 5 feet, 3 inches in height. She never did any heavy work, but managed and operated an apartment building owned by her. She had planned to prepare an apartment in this building for occupancy by her son and family when she returned to Washington.

As the train approached Washington, and had begun to slow down, Mrs. Pomeroy told Mr. Pomeroy that she felt warm and was going to get some fresh air. She asked Mr. Pomeroy to get the luggage down, and then went toward the rear of the coach. She was never again

seen alive. Her body was found at the base of a railroad signal bridge at the right of the tracks on which the train was operated, and it was stipulated that she departed through the right rear door of the coach, traveling in a southerly direction, and was killed when she struck the ground. The place where her body was found was about two miles from the Union Station in the District of Columbia.

There were no unusual lurches or jerks in the operation of the train, and it was operated in a normal manner. The former employee who testified was a ticket collector assigned to the coach in which the Pomeroys were riding and two other coaches, one in front of it, and one to the rear of it. After the train left Baltimore, he collected tickets in the three coaches, inspected the doors of the vestibules and found them all closed and in a secure position. As the train passed through Odenton, Maryland, which is about halfway between Baltimore and Washington, he made an inspection and found the doors closed. As the train passed through Seabrook, Maryland, which is about nine miles from the place where Mrs. Pomeroy's body was found, he again inspected the doors and found them closed. About five minutes later,[1] he started to walk through the coaches to announce arrival at the Union Station, and as he reached the rear of the Pomeroy coach, he found both halves of the door swinging loose in an open position.

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[1] This was the ticket collector's approximation, but if the train was traveling at its maximum allowable speed of 80 miles an hour, it would take approximately seven minutes to travel the nine miles between Seabrook and the point where Mrs. Pomeroy's body was found. The ticket collector had walked through the rear coach announcing arrival, and as he reached the vestibule of the Pomeroy (or middle) coach and observed the open doors, he was about a mile beyond the point where Mrs. Pomeroy's body was found. It would therefore appear that something more than five minutes elapsed between the Seabrook inspection and the time he started to announce arrival.

He closed both halves of the door, and continued on through the coach. It was not unusual for him to find the doors open between stations. The top half of the door is opened by pushing a handle about five feet above the floor of the car, and then pulling the door back with a latch. The bottom half of the door will not open until the top half is first opened. The bottom half is opened by turning a knob, not unlike the knob of an ordinary door. There was a sign in the vestibule, warning passengers to keep off the platform until the train stops. There were no defects in the doors.

According to the draftsman's testimony, there is a curve in the tracks about 2800 feet long, which ends about 600 feet beyond the point where Mrs. Pomeroy's body was found. It is a one-degree curve, a moderate curve and a safe curve for greater speeds than the limit allowed on it. The curve is banked to the left, so as to offset the centrifugal force brought into play as a train rounds the curve.

Although Mrs. Pomeroy left children surviving her, the only person claiming to have suffered pecuniary loss as a result of Mrs. Pomeroy's death is her husband, Mr. Pomeroy, the plaintiff. The life expectancy of both Mr. and Mrs. Pomeroy at the time of her death was a fraction over nine years. Mrs. Pomeroy owned the apartment building in which she and her husband had an apartment. She provided this dwelling for herself and Mr. Pomeroy, and used the income from the operation of the apartment building, amounting to about $200 a month, and the income from a farm, also owned by her, amount to about $500 a year, for their joint maintenance. They had no other source of income. She kept house for her husband. After her death, this property was vested in her children.[2]

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[2] The evidence shows that the children are providing for the support of their father from the income from this property, though not to the same extent as before Mrs. Pomeroy's death. But there may be recovery from a wrongdoer, regardless of anything he may receive from a "collateral source." Hudson v. Lazarus, — U.S. App. D.C. —, Nov. 24, 1954, No. 11870.

In considering the motion for judgment n.o.v., the Court must construe the evidence most favorably to the plaintiff, and give him the full effect of every legitimate inference therefrom.[3] On this basis, it would appear that Mrs. Pomeroy, feeling warm, entered the vestibule of the coach to get some fresh air; that the doors were open when she entered the vestibule; and that as the train passed around the curve, she was thrown through the open door by the operation of the train, notwithstanding the banking to offset the effect of centrifugal force.[4]

But this did not justify submission of the case to the jury under the doctrine of res ipsa loquitur. There was no collision, derailment, defect in machinery, unusual lurch or jerk. The doors were accessible to all passengers and were easily opened. All the elements requisite for the application of the doctrine of res ipsa loquitur, therefore, were not present,[5] and accordingly I found the doctrine inapplicable and refused to submit the case to the jury on that basis with appropriate instructions in use in this jurisdiction.

There was thus left for determination only the question whether there was sufficient evidence of specific negligence for submission to the jury, which I shall now discuss. It is the duty of the railroad, if it provides vestibule cars,

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[3] Gunning v. Cooley, 281 U.S. 90, 94. Shewmaker v. Capital Transit Co., 79 U.S. App. D.C. 102. Jackson v. Capital Transit Co., 69 App. D.C. 147, cert. den., 306 U.S. 630.

[4] It would be unreasonable to infer that she committed suicide, in the light of the foregoing facts, or to infer that she opened both doors for air, as the upper portion of the door would have sufficed for that purpose, and that, mechanically, had to be opened first.

[5] Washington Loan & Trust Co. v. Hickey, 78 U.S. App. D.C. 59. Norfolk & Western Ry. Co. v. Estepp, 204 F. 2d 880 (6th Cir. 1953). Brott v. Texas & Pacific Ry. Co., 35 So. 2d 801 (1948)—Louisiana.

to see that they remain closed between stations,[6] and defendant would be negligent if it failed to exercise the highest degree of care to keep them closed at such times. If reasonable men might differ on this point, the case is one for the jury; otherwise it is the Court's duty to direct a verdict for defendant.[7] If the standard were reasonable care, or the exercise of ordinary prudence and foresight, I would conclude unhesitatingly that reasonable men could not differ that such care had been exercised on the factual basis here involved. But the highest degree of care presents a different and more difficult problem. It contemplates the exercise of all the skill, prudence, and foresight within reason, consistent with the practical operation of the railroad.[8] It is defined by the Court of Appeals, in Tobin v. Penna. R.R. Co., 69 App. D.C. 262, 264, by quoting with approval Meier v. Penna. R.R. Co., 64 Pa. 225, as follows:

" 'The utmost care and vigilance is required on the part of the carrier. The rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practical care and diligence should be adopted that is consistent with the mode of transportation adopted'."

Of course I would not say, under this criterion, that it is the railroad's obligation to post an employee in every vestibule to see that the doors remain closed, but here

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[6] Minneapolis, St.P. & S.S.M.R. Co. v. Galvin, 54 F. 2d 202 (Sixth Cir. 1931), cert. denied, 285 U.S. 551. Carter v. Kurn, 127 F. 2d 415 (Eighth Cir. 1942). Calloway v. Hart, 146 F. 2d 103, 106 (Fifth Cir. 1944), cert. denied, 324 U.S. 866.

[7] Gunning v. Cooley, supra; Shewmaker v. Capital Transit Co., supra; Jackson v. Capital Transit Co., supra.

[8] Pistorio v. Washington R. & E. Co., 46 App. D.C. 479, 484. Cole v. Capital Transit Co., 90 U.S. App. D.C. 289.

there were only three inspections between Baltimore and Washington, one at the time of departure from Baltimore, one at Odenton, about halfway between these cities, and one at Seabrook, Maryland, about nine miles from the place were Mrs. Pomeroy's body was found. To be sure, the inspection at Seabrook was only a few minutes before Mrs. Pomeroy departed from the coach, but the ticket collector had only three coaches assigned to his care. His only duty, according to the evidence was to collect tickets, see to the safety of the passengers and equipment, and announce the arrival of trains at stations. At the time of this incident, the collection of tickets had been completed, and during the critical period here involved he had no duty other than to see to the safety of the passengers and equipment. He knew that it was not unusual to find the doors open between stations, and that the train was approaching its destination, with the inevitable movement and activity of passengers incident to preparation for arrival. Could reasonable men differ as to whether at that time he was sufficiently alert and vigilant to constitute the exercise of the highest degree of care and foresight? Could reasonable men differ as to whether, under these circumstances, with only three coaches to supervise, it was sufficient for him to content himself with the inspection at Seabrook until he announced arrival of the train at Washington? Could a reasonable man, under these circumstances, conclude that he failed to exercise the highest degree of care by not keeping closer scrutiny and check on these three coaches, by looking in on each of them, for example, during this critical period when passengers become restive? In other words, to use a colloquialism, was he sufficiently "on the job" to bespeak the highest degree of care in the minds of all reasonable men? I thought not at the end of the trial, and on further reflection, have not changed my mind. Accordingly the motion for judgment n.o.v. will be denied.

I have considered the motion for a new trial, and find no sufficient basis for granting it.

/s/ David A. Pine
Judge

July 6, 1955

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12912

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT,

v.

ROBERT LIVINGSTON POMEROY, Executor of the Estate of ELIZABETH EAGAN POMEROY, APPELLEE.

Appeal from the United States District Court
for the District of Columbia

Decided November 15, 1956

Mr. James C. McKay, with whom *Messrs. Hugh B. Cox, James H. McGlothlin* and *Harold M. Wilcox* were on the brief, for appellant.

Mr. Hyman Smollar, with whom *Mrs. Norma G. Zarky* was on the brief, for appellee.

Before WILBUR K. MILLER, BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* This case involves the question of the liability of a railroad for the disappear-

ance and death of a passenger. The appellee Pomeroy (hereinafter referred to as plaintiff) sued in the District Court to recover damages under Section 16-1201 of the District of Columbia Code (1951), alleging that the death of his wife was caused by the negligence of the appellant railroad company. At the conclusion of the plaintiff's evidence, the railroad moved for a directed verdict. This was denied. The railroad then declined to offer any evidence, and stood on its motion. The jury rendered a verdict in plaintiff's favor in the amount of $16,708.50. The railroad moved for judgment notwithstanding the verdict or, alternatively, for a new trial, which motion the trial court denied. The railroad has appealed. The questions before us are whether the evidence was sufficient to permit a reasonable conclusion that the railroad was guilty of specific negligence which proximately caused the death of plaintiff's wife, or, alternatively, whether, under the doctrine of *res ipsa loquitur*, negligence on the part of the railroad may be inferred without specific proof thereof.

The case was here at an earlier stage, when we reversed a judgment of the District Court dismissing the complaint upon plaintiff's opening statement. *Pomeroy v. Pennsylvania Railroad*, 96 U.S.App.D.C. 128, 223 F.2d 593 (1955). On remand, a jury trial was held. The plaintiff's evidence, together with certain stipulations, disclosed the following:

On September 5, 1950, Mrs. Pomeroy and her husband were coach passengers on one of the railroad's trains en route to Washington. As the train approached its destination, she told her husband that she felt warm and was going to the vestibule to get fresh air. She went toward the rear of the coach and was never again seen alive. Later her body was found to the right of the tracks at Signal Bridge 1338/1339 in the District of Columbia,

about 2½ miles from Union Station. The body was lying on the outside edge, and 600 feet from the end, of a "very moderate" (one degree) curve in the tracks totaling 2,800 feet in length.

It was stipulated that Mrs. Pomeroy left the train through the right rear door of the vestibule of the coach in which she had been sitting and was killed when she struck the ground. No one, however, witnessed her "fall" or the manner in which it occurred, and she of course did not live to give a statement. The evidence rules out the likelihood that she voluntarily jumped from the train.[1]

A ticket collector was in charge of three coaches, including the car on which Mrs. Pomeroy was riding, on the day in question. He testified that his duties were to collect tickets and fares, see to the safety of his passengers, keep his equipment in the best shape possible to his knowledge, and see that passengers were received and discharged properly. As the train left Baltimore, the last stop before Washington, he collected tickets, went through the vestibules of all three cars under his care, and saw no open doors; he inspected his cars again as the train passed through Odenton, Maryland, the halfway point between Baltimore and Washington, and found no open vestibule doors; he again inspected the doors as the train passed through Seabrook, a point approximately 11½ miles from Washington Union Station, and found none open. As he went through some 5 to 9 minutes

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[1] Mrs. Pomeroy was 69 and was returning home with her husband from a family reunion in New Jersey, in connection with the birth of a child to their son. She was in excellent health and spirits, and was looking forward to readying an apartment (in a building owned by her) for the son and his family, who were expected to move to Washington shortly. She was perfectly normal, capable, and healthy, though never a strong woman. Thus, the evidence supports the ordinary presumption against suicide.

later[2] to announce the train's arrival at the station he found, at a point about 1 mile past the place where Mrs. Pomeroy's body was later found and 1½ miles from Union Station, both halves of one of the vestibule doors at the right rear of the Pomeroy coach swinging freely. He closed them and continued through his cars. It was not unusual for the collector to find doors open between stations and on the trip in question he had seen the top halves of some doors open. The vestibule doors were halved horizontally. The top half had to be opened first. This was done by turning a latch 5 feet above the floor and swinging the door back against the bulkhead where it was caught with a safety catch. The bottom half was 36 inches high and was opened by turning a knob, very like a doorknob, and swinging the door against the bulkhead where it was designed to be held by a safety catch. After both halves of the door were thus opened and secured, the trap door over the steps leading to the ground could be raised. The trap door was not raised when the collector found the doors swinging freely.

The right rear vestibule doors of the Pomeroy car were not defective, and operated smoothly. They were not hard to open, but it took a "lot of physical strength" to slam them firmly and securely against the bulkhead.

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[2] The ticket collector's estimate of the time was about 5 minutes. The trial court thought, however, that the time must have been somewhat greater. There was no direct evidence as to the speed of the train. If, however, it was traveling for the whole 10 miles at a speed of 80 miles an hour (the speed limit on the curve), the elapsed time would have been 7½ minutes. The curve was less than 1 mile in length and the train's speed for the 8 plus miles before reaching the curve may have been greater than 80 miles. It was slowing down at the time Mrs. Pomeroy went to the vestibule, and its average speed for the 10 miles may have been something less than 80 miles per hour. The ticket collector stated that Seabrook is about 9 minutes from Washington (11½ miles away). A range of 5 to 9 minutes would therefore seem to incorporate the outside limits of the elapsed time.

There were hand rails for passengers in the vestibule and a warning sign stating that passengers are forbidden to loiter on platforms "any time" the train is in motion. At the time in question the train was being operated normally, with no unusual lurches or jerks. There is no evidence that the vestibule was not adequately lighted, or that it was wet, slippery or otherwise unsafe for passengers. There was testimony that, in going around a curve, a train tends to produce centrifugal force and to offset this the outer rail on the moderate curve (near the end of which Mrs. Pomeroy's body was found—outside the curve) was raised 3½ inches higher than the inner rail, so that the train banked into the curve.

In ruling on the railroad's motion for judgment n.o.v., the trial judge stated that where a railroad provides vestibule cars, it has a duty to see that the vestibule doors remain closed between stations, and that it would be guilty of negligence if it failed to exercise the highest degree of care, consistent with the practical operation of the railroad, to keep them closed at such times.[3] He pointed out that there were only 3 inspections of the vestibule doors between Baltimore and Washington prior to the time the ticket collector went through to announce arrival at Washington station, that the collector knew it was not unusual to find doors open between stations, and that there was inevitable movement and activity of passengers as the train was approaching the station. He concluded that in these circumstances reasonable men could differ as to whether the collector was sufficiently vigilant in checking the doors to comply with the degree

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[3] We think this is a correct statement of the law. See Carter v. Kurn, 127 F. 2d 415, 418 (8th Cir. 1942), and cases cited; St. Louis, I.M. & S. Ry. Co. v. Oliver, 92 Ark. 432, 433-435, 123 S.W. 662-663 (1909); and see Tobin v. Pennsylvania R. Co., 69 App. D.C. 262, 264-65, 100 F. 2d 435, 437-438 (1938), cert. denied, 306 U.S. 640 (1939).

of care required, and thus that it was a question for the jury as to whether there was negligence in this regard.

1. To repeat, the railroad owed its passengers the highest degree of care, consistent with practical operation. The District Court stated that under this criterion it is not the railroad's obligation to post an employee continuously in every vestibule to see that the doors remained closed between stations, and the plaintiff agrees that this is so. There is no suggestion from anyone that the railroad was required, under this standard, to have other employees, in addition to the ticket collector, in the coaches to assist in watching the vestibules. The plaintiff also in effect concedes that the ticket collector was not required to "dash back and forth between coaches" in an effort to inspect vestibule doors more frequently. He does say that, to comply with the standard of highest practical care, the ticket collector here should have made inspections "more often than once in seven or eight minutes" when he "is not otherwise engaged." We agree that the number of inspections that may be required at any time must depend upon the collector's other duties. Practical operation would dictate this. On the issue here, then, whether under the highest care standard more frequent inspections were reasonably needed during the time involved, an essential inquiry is whether the ticket collector had the opportunity, consistent with the performance of his other duties, to make further inspections of vestibule doors in the 5 to 9 minute interval between the inspection at Seabrook and the trip through the coaches to announce the train's approach to Washington station. As the party having the burden of proof, the plaintiff had the obligation, as an element in showing negligence of this sort, to introduce sufficient evidence to permit the conclusion that there was opportunity for further inspections. *Cf. Tobin* v. *Pennsylvania R. Co.*, 69 App.D.C. 262, 263, 100 F.2d 435, 436 (1938), cert. denied, 306 U. S. 640 (1939).

Since the last stop had been at Baltimore, the ticket collector's duty of collecting tickets had been completed before the train reached Seabrook. But the ticket collector had other duties between stops; he was also in charge of equipment and passengers in his three coaches.[4] For the most part, the evidence fails to show how the collector spent the 5 to 9 minute interval involved here. It is of course clear that he spent at least a part of that time in moving through his cars to complete the Seabrook inspection trip and to return to the rear vestibule of the Pomeroy car where he found the open doors. It is possible that, as he passed through, he checked equipment, locked restrooms, stopped to answer questions and assist passengers in various ways, and that such duties consumed the available time, but there is no proof that this was so. On the other hand, it is also possible that the collector's duties on the coaches did not keep him occupied during this interval and that he was idle some of the time, but there is no evidence that this was so. The record simply is silent on this crucial point. The plaintiff, who it must be remembered had the burden of proof, called the ticket collector as a witness but failed to inquire as to his activities in the pertinent interval of time. As a result, the jury was not given any evidentiary basis to infer or conclude that the collector had sufficient time and opportunity, in the short interval involved, to make a further inspection of vestibule doors. In the absence of any evidence supporting or even suggesting the conclusion that the ticket collector was not occupied with his duties in respect of other passengers and other equipment, the District Court erred in submitting to the jury the issue of whether the railroad was

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[4] The collector described his duties in these words without further elaboration: "Well, you are to lift fares and lift tickets, and see to the safety of your passengers, and keep your equipment in the best shape possible to your knowledge and see that passengers are received and discharged properly."

guilty of negligence in failing to inspect again the rear vestibule doors of the Pomeroy coach. *Gunning* v. *Cooley*, 281 U.S. 90, 94-95 (1930); *Capital Transit Co.* v. *Gamble*, 82 U.S.App.D.C. 57, 58, 160 F.2d 283, 284 (1947).

In other cases similar to this one—where a passenger has been killed as the result of an unwitnessed and unexplained fall through an unexplained open vestibule door[5]—the holding has universally been that the railroad is entitled to a directed verdict or judgment as a matter of law. For example, in *Brott* v. *Texas & Pac. Ry. Co.*, 35 So. 2d 801 (La. App. 1948), the railroad was absolved of negligence even though the last inspection of vestibule doors had occurred after the last stop, 10 miles away from the place where the body was found. And see *Scott* v. *New York Cent. R. Co.*, 216 App.Div. 623, 216 N.Y.S. 163 (1926), where all vestibule doors had been closed after the last stop (which a map shows was considerably more than ten miles back) but there appears to have been no evidence of subsequent inspections, and *Cannon* v. *Louisville & N.R. Co.*, 252 Ala. 571, 42 So.2d 340 (1949), where the evidence was "silent as to whether the doors were closed or open shortly prior to the time Sanders [the passenger] was killed." 42 So.2d at 345. Here, the collector inspected the vestibule doors at a point about 9 miles, and about 5 to 9 minutes, before Mrs. Pomeroy fell to her death and again (in connection with announc-

[5] See: Cannon v. Louisville & N.R. Co., 252 Ala. 571, 42 So. 2d 340 (1949); Brott v. Texas & Pac. Ry. Co., 35 So. 2d 801 (La. App. 1948); Wright v. Central R. Co. of New Jersey, 124 N.J.L. 113, 11 A. 2d 20 (1940); Holland v. Boston & M.R.R., 279 Mass. 342, 181 N.E. 217 (1932); Scott v. New York Cent. R. Co., 216 App. Div. 623, 216 N.Y.S. 163 (1926); Hart v. St. Louis & S.F. R. Co., 80 Kan. 699, 102 Pac. 1101 (1909). *Cf.* Norfolk & Western Ry. Co. v. Estepp, 204 F. 2d 880 (6th Cir. 1953); Brown v. Union Pac. R. Co., 81 Kan. 701, 106 Pac. 1001 (1910); Cole v. Missouri-Kansas-Texas R. Co. of Texas, 179 S.W. 2d 343 (Tex. Civ. App. 1944).

ing arrival at Washington station) about 1 mile after the place where she fell. The elapsed time between these checks could not have exceeded 9 minutes. Certainly it would seem that the standard of care set in the cases just cited, and those cited in footnote 5, was amply met. But it is enough to say that plaintiff has not sustained the burden of offering evidence to support a contrary inference.[6] It must be noted, too, that a mere showing of opportunity to inspect is not sufficient in itself to establish a case for the jury; other considerations enter, as will appear in part two of this opinion.

Apparently recognizing that his proof may be thought inadequate to permit a reasonable inference of negligence, the plaintiff urges that a jury's verdict need not necessarily be based on evidence but that it may rest on speculation and conjecture. He relies chiefly on *Lavender* v. *Kurn*, 327 U. S. 645 (1946). That was a suit by the administrator of a railroad switchman under the Federal Employers' Liability Act, where liability is imposed for injuries resulting in "whole or in part" from the em-

[6] The plaintiff cites cases which are distinguishable on their facts. For example, in Carter v. Kurn, 127 F. 2d 415 (8th Cir. 1942), there was evidence, if believed, "justifying a finding that the [vestibule] door had been opened by one of the train crew." 127 F. 2d at 419. In Johnston v. St. Louis & S.F.R. Co., 150 Mo. App. 304, 130 S.W. 413 (1910), there was evidence, if believed, that the vestibule door had been open so long that the railroad should have discovered and closed it, and that the vestibule was so poorly lighted that the open door could not be observed. In Robinson v. Chicago & Alton R. Co., 135 Mich. 254, 97 N.W. 689 (1903), the open door was due to defective fastenings which failed to hold it shut. In Minneapolis, St. P. & S.S.M. Ry. Co. v. Galvin, 54 F. 2d 202 (6th Cir. 1931), *cert. denied*, 285 U.S. 551 (1932), it was held to be the jury's function to resolve sharp conflicts in the evidence and decide whether the plaintiff fell through an open vestibule door as a result of a sudden lurch, as he testified, or whether, as the railroad's witnesses testified, the door was not open and plaintiff was never inside the coach but fell while clinging to the coach on the outside of the closed vestibule door.

ployer's negligence. The switchman had been killed at night in the performance of his duties by a blow on the head from a "fast moving small round object." Although there were no eye witnesses to the blow itself, there was evidence that a mail hook, meeting that description, projected from the side of the train then being switched by the switchman, and that in certain circumstances it could have struck the fatal blow. There was also conflicting "evidence tending to show that it was physically and mathematically impossible for the hook to strike" the switchman, as well as "facts from which it might reasonably be inferred that" the switchman "was murdered." 327 U. S. at 652. In holding that appellate courts are required to abide by the jury's verdict in such circumstances, the Supreme Court pointed out that "the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts" (p. 652), and stated (p. 653):

> "It is no answer to say that the jury's verdict involved speculation and conjecture. *Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences,* a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, *there is an evidentiary basis for the jury's verdict,* the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis supplied.)

Thus, the Supreme Court made it abundantly clear that there must be proved facts to support the conclusion

reached. See also *Myers* v. *Reading Co.*, 331 U.S. 477, 485 (1947), and the recent *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523 (1956), where the Court said (p. 526):

> "Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, *grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.*" (Emphasis added.)

The Supreme Court has done much in recent years to effectuate the liberal purposes of the FELA, and has on repeated occasions sustained jury verdicts based on the injury or death of railroad employees resulting "in whole or in part" from the railroad's negligence, including its failure to provide safe working conditions—as in *Lavender* and *Schulz*. But the decisions of the Court in this field should not be understood as making a railroad the insurer of its employees. *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949). Much less should they be regarded as making a railroad the insurer of its passengers. Towards them, negligence remains the test, unmodified by FELA or any other special legislation, except perhaps where the plaintiff alleges violation of the safety laws, such as the Safety Appliance Acts, 36 STAT. 298, 45 U.S.C. §§ 1 *et seq.* (1952). *Cf. Jacobson* v. *N.Y., N.H. & H. R. Co.*, 206 F.2d 1953, 156 (1st Cir. 1953), aff'd, 347 U.S. 909 (1954). No such violation is here alleged. We do not find that the Supreme Court has cast doubt upon the principle that a passenger or his representative has the burden, if he is to succeed in a suit for negligence against a railroad, of introducing sufficient evidence to warrant the inferences required to support a verdict in his favor.[7]

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[7] In many instances, of course, the plaintiff is entitled to the benefits of the doctrine of *res ipsa loquitur*, a matter to be discussed later.

We know of no authority which rejects that principle, or suggests that appellate courts should abdicate their responsibility to see that verdicts are based on adequate evidence. In the circumstances, we cannot relieve the plaintiff—relying on an alleged act of specific negligence—of the burden of making prima facie proof of that act, nor can we hold that a jury is free to make any guess or conjecture it likes, without any evidentiary basis therefor.

We do not suggest, of course, that the decisions under the Federal Employers' Liability Act have no helpful application to other types of suits for negligence. What we do say is that those decisions do not lower the threshold of proof to the level claimed by plaintiff-appellee here. Surely if a railroad employee had disappeared from his train under circumstances similar to those of this case, with no further showing of specific negligence, and with no showing of unsafe working conditions or violation of law, there could be no liability on the part of the railroad. *Lavender* and *Schulz* cannot be carried that far, and no consideration of public policy would suggest that they should. This is not a case, such as the *Lavender* case, where the evidence can be said to give some support to several conflicting possible inferences, a situation where the jury's function is apparent. The proof here sheds no light on either possibility: whether the ticket collector was occupied with other duties, or whether he was idle, during a part of the time in question.[8] The plaintiff has thus failed to present facts warranting one of the inferences necessary to establish the act of negligence relied on.

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[8] As already pointed out, it is a reasonable inference that a part of the time was spent in moving through his cars to complete one inspection trip and to return to the Pomeroy rear vestibule on the announcement-inspection trip.

As an alternative theory, the plaintiff suggests that the railroad was guilty of another kind of negligence. He asserts that, because the doors were later found by the ticket collector to be swinging freely, the jury could reasonably infer that they were not fully closed at the time of the Seabrook inspection or that there were defects in the latching mechanisms of both halves which caused them to swing open without any human intervention. But the ticket collector's testimony is that the doors were closed at Seabrook and were not defective in any respect, and there is no evidence to the contrary.[9] The fact that the doors were not secured against the bulkhead is not evidence which refutes his testimony since that fact is consequential rather than probative in

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[9] At the time of the trial the ticket collector was not employed by the railroad. He had left its employ two years before the trial date to operate a gasoline service station, which he still was doing. The trial court ruled that the ticket collector, who was called by plaintiff, was not a hostile witness and that plaintiff's counsel was not surprised by his cross-examination, which amplified but did not conflict with his direct examination. Nevertheless, the plaintiff says that he was not bound by every aspect of the ticket collector's testimony: specifically, the testimony that there were no defects and that the doors were closed at Seabrook. It, of course, is true that a party may not be concluded by the testimony of his own witness in many situations: e.g., where there is conflicting evidence (Alamo v. Del Rosario, 69 App. D.C. 47, 98 F. 2d 328 (1938)); where the testimony is improbable (Washington Loan & Trust Co. v. Hickey, 78 U.S. App. D.C. 59, 137 F. 2d 677 (1943)); where the testimony was based on a mere guess (Hilleary v. Earle Restaurant, 109 F. Supp. 829, 834 (D. D.C. 1952)). But here no circumstances have been shown which would justify disbelief of the ticket collector's testimony in the one respect urged by the plaintiff. It is to be noted that the ticket collector's testimony must be rejected on one point. He said that the doors he found open were in the front vestibule of the Pomeroy coach. This was in conflict with a stipulation previously made by counsel that the open door through which Mrs. Pomeroy left the train was in the rear vestibule. The trial court ruled that the stipulation would govern in this respect, and appellant does not quarrel with the ruling.

this context. The swinging doors could be explained by any of various conjectures—e.g., that Mrs. Pomeroy[10] or a third person opened and failed to secure the doors against the bulkhead, or that the latches on the doors were defective, or that the doors were not fully closed when previously inspected. But the fact that the doors were swinging does not indicate or select any one of the possible explanations for that fact as the correct or most probable one, and specifically does not authorize selection of the one possible explanation which the ticket collector's testimony expressly negates.

There is no contention or suggestion that the railroad was guilty of negligence in any other respect. Although the trial court stated that Mrs. Pomeroy "was thrown

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[10] Since Mrs. Pomeroy went to the vestibule for the purpose of getting fresh air, it seems likely that she would have tried to open the top half of the door, if it was not already open when she got there. She would hardly have attempted to open the bottom half for this purpose, but she may have inadvertently done so by mistake of some kind. She was not a strong woman although "perfectly normal, capable and healthy," and it can be assumed that, if she did unlatch the doors, which the evidence shows was "not hard," it was beyond her physical strength to slam them against the bulkhead sufficiently hard to secure them—an assumption that would explain the fact that the doors were shortly afterwards found to be swinging freely. This of course is conjecture, but it "serves to show the extent to which speculation may run, where there are no facts by which it is guided or limited." Hart v. St. Louis & S.F. R. Co., 80 Kan. 699, 102 Pac. 1101 (1909). We noted in the prior appeal of this case (Pomeroy v. Pennsylvania Railroad, 96 U.S. App. D.C. 128, 129, fn. 1, 223 F. 2d 593, 594, fn. 1 (1955)) that the railroad conceded that it was "highly improbable that the lady's strength would have enabled her to open the door." Such concession is consistent with what we have assumed above—that Mrs. Pomeroy may have unlatched the doors, but could not secure them, an act which took a "lot of physical strength." In any event, the concession was made in connection with the argument of a motion for a directed verdict at the conclusion of the plaintiff's opening statement. The concession was evidently thought required for the purposes of the motion.

through the open door by the operation of the train, notwithstanding the banking to offset the effect of centrifugal force" on the curve,[11] it did not suggest that it would be reasonable to find that the railroad operated the train negligently or that it was negligent in not banking the track on the curve to a greater extent. There was no evidence to support a finding of negligence in either respect.

2. It is axiomatic that, to prevail in a negligence case, a plaintiff must prove sufficient facts, not only to warrant an inference of negligence, but also to justify an inference that such negligence was proximately related to the injury or death. *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29, 32 (1944); *Hernandez* v. *Southern Union Gas Co.*, 209 F.2d 606, 610 (10th Cir. 1954). As we stated in *Collins* v. *District of Columbia*, 60 App.D.C. 100, 102, 48 F.2d 1012, 1014 (1931):

> "The causal connection between the accident and the negligence of the defendant must not be left to mere conjecture or supposition."

If we assume here, contrary to what we have concluded above, that the plaintiff has offered sufficient evidence to support a conclusion of negligence, the question remains whether an inference can reasonably be drawn that such negligence was the cause of the fall and resulting death.

There can be no doubt that if the vestibule doors had not been open Mrs. Pomeroy could not have fallen out, and therefore that the open doors were one of the factors that caused or contributed to her fall from the train. But vestibule doors can be freely opened by passengers as well as by railroad employees, and the fact that these

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[11] We do not decide whether this is a reasonable inference, because on the view we take the precise immediate agency which caused Mrs. Pomeroy to go through the open door is irrelevant. The evidence of course is silent as to what that agency was.

doors were open was not *per se* negligence on the railroad's part. The only act of negligence involved here, assuming that there was negligence, was the failure to make further checks of the vestibule doors in the short interval between the Seabrook inspection and Mrs. Pomeroy's fall. To establish the causal relation between this assumed negligence and the death, it must be a reasonable inference from the proof—not a "mere conjecture or supposition"—that such negligence was responsible for the door being open at the time in question. In our view the evidence does not permit such a conclusion.

The vestibule doors in question were closed at Seabrook, 9 miles before the place where Mrs. Pomeroy left the train, and they were obviously open when she fell. We know that they must have been opened by someone, since under the evidence there were no defects which might have caused them to swing open by themselves. The evidence does not indicate who opened the doors in that interval or the length of time they had been open, except that the time could not have exceeded the 5 to 9 minutes it took the train to travel the 9 miles after the Seabrook inspection. The only possibilities are that they were opened by some employee of the railroad other than the collector, or by Mrs. Pomeroy after she entered the vestibule,[12] or by some other passenger on the train. If a railroad employee left the doors open or if another passenger opened the doors sufficiently far in advance of the accident that the railroad should have discovered and closed them, the open doors could properly be attributed to its negligence. But if the doors were opened by another passenger not sufficiently far in advance of the accident to give the ticket collector an opportunity to find and close the doors, the open doors could not reasonably be attributed to any negligence on the part of the railroad. A similar conclusion follows if

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[12] See fn. 10, *supra*.

Mrs. Pomeroy herself opened the doors after reaching the vestibule, since the testimony is uncontradicted that she left for the vestibule shortly before the train was due to arrive in Union Station, and there could therefore have been scarcely any time between her opening the door and falling out in which the ticket collector could have had an opportunity to find the open door. See *Williams* v. *New Jersey-New York Transit Co.*, 113 F.2d 649 (2d Cir. 1940); *Merritt* v. *Interstate Transit Lines*, 171 F.2d 605, 609 (8th Cir. 1948).

The causal connection between the open doors and the assumed negligence thus appears in the case of two of these suppositions but not in the case of the other two. But as previously stated, the evidence does not afford any basis at all to select any one of the four possibilities. Only by an arbitrary guess, not based on or warranted by, any record evidence, could it be inferred that the vestibule doors were opened by a railroad employee or by a passenger under circumstances that would attribute the open doors to the railroad's failure to inspect the vestibule doors in the interval in question. In these circumstances, the jury could not reasonably infer that the doors were open, and that Mrs. Pomeroy's death occurred, as a result of the railroad's assumed negligence.[18] See *Brown* v. *Capital Transit Co.*, 75 U.S.APP.D.C. 337, 127 F.2d 329, cert. denied, 317 U.S. 632 (1942); *cf. Reece* v. *Capital Transit Co.*, 97 U.S.App.D.C. 274, 230 F.2d 824 (1956).

3. The doctrine of *res ipsa loquitur* does not require a result opposed to the conclusions recited above. When this case was previously before us, we indicated that consideration of the applicability of the doctrine of *res*

[18] Not only is there no evidence of any kind, but there are no presumptions in this case to aid a jury in selecting any one of the possible conjectures. Thus, it is distinguishable from Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 33-35 (1944), where circumstantial evidence, as well as certain presumptions, supported the inference which the jury drew.

ipsa loquitur was to await presentation of the plaintiff's evidence. *Pomeroy* v. *Pennsylvania Railroad*, 96 U.S. App.D.C. 128, 223 F.2d 593 (1955). After the plaintiff's case was in, the District Court ruled that the doctrine did not apply to the facts proved by plaintiff. We agree with the District Court.

In general, the rule is that, where an injury occurs which in the ordinary course of things would not have occurred if the one having control had used proper care, a reasonable basis is afforded, in the absence of any explanation, to attribute the injury to the lack of care on the part of the defendant. See *Jesionowski* v. *Boston & Maine R. Co.*, 329 U. S. 452, 456 (1947). We have said that negligence may be inferred without additional proof thereof, when (1) the cause of an accident is known, (2) the cause was in the defendant's control or right of control, and (3) the cause was unlikely to do harm unless the defendant was negligent. *Washington Loan & Trust Co.* v. *Hickey*, 78 U.S.App.D.C. 59, 61, 137 F.2d 677, 679 (1943). Examination of the facts discloses that some of these elements are not present in this case.

The open vestibule doors were unquestionably a contributing or partial cause of Mrs. Pomeroy's fall. To that extent—and to that extent only—the cause of Mrs. Pomeroy's death is known. The District Court went further, and inferred that centrifugal force was the means immediately causing her fall. But even that, assuming *arguendo* that the inference is correct, is not enough. The vestibule doors were accessible to all passengers and could be freely opened by anyone, for reasons of both safety and convenience, so that the necessary element of control over the opening of the doors is lacking.[14] See

[14] Maintenance of the doors was of course under the exclusive control of the railroad, but here there was no evidence of a defective condition in the door which caused the accident. Thus, this case is distinguishable from Safeway Stores v. West, 86 U.S. App. D.C. 99, 180 F. 2d 25, *cert. denied*, 339 U.S. 952 (1950), where the accident was caused by a broken coil spring in the door.

Norfolk & Western Ry. Co. v. *Estepp*, 204 F.2d 880, 882 (6th Cir. 1953). To be sure, an open vestibule door on a moving train is a potentially dangerous thing, but the fact that it was open does not in and of itself presuppose negligence. As has already been shown, in the absence of proof, various equally plausible conjectures, other than the railroad's negligence, would account for the open doors. Since the doors may have been open for reasons other than a failure of duty on the railroad's part, it cannot be said that the accident would not in the ordinary course have occurred if the railroad had not been negligent.

In the absence of proof of the necessary elements to bring the doctrine of *res ipsa loquitur* into play, the jury could not properly infer negligence on the part of the railroad, without specific proof thereof, from the mere fact that Mrs. Pomeroy fell through an open vestibule door of a moving train. See *Norfolk & Western R. Co.* v. *Estepp, supra; Brott* v. *Texas & Pac. Ry. Co.*, 35 So. 2d 801 (La.App. 1948); *Brown* v. *Union Pac. R. Co.*, 81 Kan. 701, 106 Pac. 1001 (1910).

Reversed and remanded with directions to enter judgment for the defendant.

BAZELON, *Circuit Judge* dissenting:

The jury decided for the appellee because it found that the appellant had negligently failed to make an adequate number of inspections of the vestibule doors and that, as a result of such negligence, decedent had fallen to her death through an open door. My colleagues hold that there was no evidence from which the jury could have found (1) that appellant's ticket collector had any opportunity to make any additional inspections, or (2) that, even if there had been such opportunity, the failure to inspect was proximately related to the accident.

Whether there was opportunity for additional inspection and, thus, whether appellant was negligent depends

upon what other duties the ticket collector had during the five to nine minute period in question. The collector testified that his duties were "to lift fares and lift tickets and see to the safety of [the] passengers, and keep [the] equipment in the best shape possible to [his] knowledge, and see that passengers are received and discharged properly." The evidence was, further, that the collection of fares and tickets and the receipt of passengers had already been completed prior to the time here in question and that the discharge of passengers would not occur until arrival at Union Station. Hence, the only duties to be executed by the collector in the crucial period were those which the jury apparently found he had negligently failed to execute, namely, to keep the equipment in the best possible condition (e.g., the doors closed) and see to the safety of his passengers (e.g., prevent the decedent from falling off the train.) I think the jury could fairly have inferred, as apparently it did, from the collector's testimony as to what his duties were, that he had an idle period during which he could have made another inspection of the doors. If some undescribed other duty had to be or was performed during that interval, the appellant should have introduced some evidence of it.

I cannot agree with the majority that, merely because inferences in conflict with the jury's inferences are possible, the jury should not be allowed to decide the facts. "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Tennant* v. *Peoria & P.U.R. Co.*, 321 U. S. 29, 35 (1944). I would follow *Schulz* v. *Pennsylanvia R. Co.*, 350 U. S. 523 (1956), and *Lavender* v. *Kurn*, 327 U. S. 645 (1946).

In *Schulz*, a tugboat fireman whose duty called for him to work on four tugboats moored side by side, stepping from one to another, was found drowned in the harbor.

There was no evidence as to how he feel into the water, but there was evidence that he was a capable and experienced workman, that three of the tugs were unlighted and the fourth partially lighted, and that there was some ice on the tugs. 350 U. S. at 524-25. The trial court directed a verdict in favor of the defendant. The Court of Appeals for the Second Circuit, reasoning as do my colleagues in the instant case, affirmed, saying:

> "The evidence of such alleged negligence was slight, and perhaps at most only doubtfully sufficient to present a jury question as to defendant's breach of duty. But beyond this, there was no showing whatsoever that the alleged conditions were causally related to the accident. Plaintiff never contended that the ice completely covered the barges or that the pier or the barges were entirely shrouded in darkness. We have no way of knowing how or where the accident occurred, and cannot say that it was promixately caused by any default on the part of the defendant." 222 F.2d 540, 541 (1955).

The Supreme Court reversed because the evidence was sufficient to require submission of the case to the jury. The Court said:

> "But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences." 350 U. S. at 526.

In *Lavender* v. *Kurn*, a railroad switch-tender was found dead in the switchyard with a wound in his head. The plaintiff's theory was that the blow came from a negligently maintained mail hook hanging on the outside of a passing mail car. The evidence indicated that the hook "*might* pivot" and its end "*could* thus be swerving

out to a point 3 to 3½ feet from the rail and about 73 inches above the top of the rail." 327 U. S. at 649.[1] Decedent was too short to be struck by the end of the hook unless he was on an elevation of some kind. There was such an elevation—an "uneven" mound of cinders *some* parts of which were high enough. *Ibid.* There was no evidence that decedent had in fact been standing on the mound. But *"If he had been standing on the mound about a foot from the side of the mail car he could have been hit* by the end of the mail hook . . . His wound was *well within the possible range* of the mail hook end." *Ibid.* The defendant's theory was a simpler one—that decedent had been murdered by a blow with a pipe. There were facts in the record "from which it might reasonably be inferred" that the murder theory was correct. *Id.* at 652. Indeed, there was even "evidence tending to show" that plaintiff's theory was "physically and mathematically impossible." *Ibid.* The jury's verdict for the plaintiff was upset by the Illinois Supreme Court on the ground that, although decedent *" 'could have been* struck by the mail hook knob if[2] he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches . . . [,] all reasonable minds would agree that it would be mere speculation and conjecture to say that [he] *was* struck by the mail hook' and that 'plaintiff failed to make a submissible case on that question.' " *Id.* at 651.

Like the Supreme Court of Illinois in *Lavender*, the majority here holds that the jury's verdict was based not on rational inferences, but on speculation and conjecture. The evidence, in its view, as easily supports an inference that there was not an opportunity to inspect the doors again as that there was, and an inference that the acci-

[1] Emphasis here and hereinafter supplied, unless otherwise indicated.

[2] Emphasis in original.

dent was not caused by the failure to inspect the doors again as that it was. I think what the Supreme Court of the United States said in reversing the Supreme Court of Illinois in *Lavender* applies equally well to the majority view here:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Id.* at 653.[3]

If the evidence in *Lavender* v. *Kurn* satisfied the Supreme Court that a jury could infer that the injury resulted from the defendant's action or inaction, I do not see how the evidence here can fail to satisfy us. Indeed, in my judgment, this is a stronger case than *Lavender* v. *Kurn*. If the jury could reasonably infer, as from the evidence here it clearly could, that the appellee was negligent in not checking the doors more frequently, I think it is a highly probable inference that proper care would have avoided the accident. I concede the physical possibility that some stranger could have followed appellee's agent about and opened the door right after it had been checked. In the circumstances, I think the

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[3] See also *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. at 525-26.

judgment of comparative probability was well left to the jury.

That *Lavender* and *Schulz* arose under the Federal Employers' Liability Act, 45 U.S.C. § 51 (1952), is not a reason, so far as I am concerned, for limiting in any way the effect of those decisions in non-F.E.L.A. cases.[4] The line of cases of which *Lavender* and *Schulz* are representative reversed a trend toward appellate domination of juries which had deprived "jury trial in current civil cases . . . [of] most of its significance." Green, *Jury Trial and Mr. Justice Black*, 65 YALE L. J. 482 (1956). I would not restrict this salutary development to F.E.L.A. cases. The suggestion that it should be so restricted because "under that act, the jury's power to draw inferences is greater than in common-law actions",[5] has been criticized as unjustified and merely reflecting "how far the courts have gone in other areas of litigation in restricting, if not denying, the jury's orthodox common-law function to draw inferences." *Id.* at 490, n. 17. The language of the Court in *Lavender* and *Schulz* which I quote in this opinion is not related to the "in whole or in part" provision of the statute. Nor do I find in those cases anything else that makes them inapplicable to cases like the instant one which arise under the common-law. I do find that the appellate interference with juries which the Supreme Court condemned in the F.E.L.A. cases was based upon the same ground as the majority's decision in the instant case. *Id.* at 489.

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[4] I see no reason to distinguish between a case where a passenger mysteriously falls from a train and one where an employee mysteriously falls from a barge. If the threshold of proof is low enough to be reached by the unexplained circumstances of the one case, it seems to me it is also reached in the other.

[5] *Cahill* v. *New York, N. H. & H. R. R.*, 224 F. 2d 637, 640 (2d Cir. 1955) (dissent), reversed 350 U.S. 898 (1955), amended 351 U.S. 183 (1956).

No. 874

FILED
APR 19 1957

Supreme Court of the United States

OCTOBER TERM, 1956

ROBERT LIVINGSTON POMEROY, EXECUTOR OF THE ESTATE OF ELIZABETH EAGAN POMEROY,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

HUGH B. COX,
JAMES H. MCGLOTHLIN,
JAMES C. MCKAY,
701 Union Trust Building,
Washington 5, D. C.
Counsel for Respondent.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (J.A. 9A-15A) is reported in 132 F. Supp. 257. The opinions in the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 7a-30a) are reported in 239 F. 2d 435.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1956. A petition for rehearing was

denied on January 2, 1957. The petition for certiorari was filed on April 1, 1957. The jurisdiction of this Court is sought to be invoked under U.S.C., Title 28, Section 1254(1).

STATUTES OR REGULATIONS INVOLVED

There are no statutes or regulations involved.

QUESTION PRESENTED

Whether the court below properly concluded, in an action for wrongful death, that the evidence was not sufficient to permit a reasonable conclusion that respondent railroad was guilty of negligence.

STATEMENT

This is an action for wrongful death, by the executor of the estate of the deceased, based on the claim that the decedent met her death because of the negligence of the respondent. At the conclusion of petitioner's evidence, respondent moved for a directed verdict. When this was denied, respondent stood on its motion, the case was submitted to the jury, and a verdict was entered for petitioner. Respondent's motion for judgment notwithstanding the verdict was denied (J.A. 9A-15A).

Petitioner's evidence, as supplemented by various stipulations, revealed the following:

On September 5, 1950, the deceased and her husband boarded respondent's train at Trenton, New Jersey, bound for Washington, D. C. (J.A. 39A). Shortly before the train reached Washington, the deceased, who was riding with her husband in one of the day coaches, told him that she was very warm, that she was going to get a little fresh air, and left her seat (J.A. 43A-44A). She was not thereafter seen alive. Her body was later found beside the tracks. It was stipulated that she had

left the train through the right rear door of the coach on which she was traveling, and met her death when she struck the ground.

The decedent's husband testified that he recalled no unusual motion of the train from the time the deceased left her seat until the time the train arrived in Washington, and that the train appeared to have been operated in a normal manner (J.A. 50A). There was also testimony that the point at which the body of the deceased was found was 600 feet from the end of a 2800 foot curve to the left. Petitioner's witness testified that the curve is a one-degree curve and "very moderate"; that the rails are slightly banked on the curve to offset centrifugal force; and that the speed limit on the curve is 80 miles per hour (J.A. 22A-23A). There was no evidence as to the speed of the train.

The ticket collector testified that he was assigned to three coaches, of which the coach in which the decedent and her husband were traveling was the middle one. When the train left Baltimore, all of the vestibule doors in all of his three coaches were closed. He made an inspection of his coaches as the train passed through Odenton, Maryland, about half way to Washington, and again found them all closed. He made another inspection as the train passed Seabrook, Maryland, about 9 miles from where the deceased was found, and again found all doors closed (J.A. 25A-30A, 32A, 52A).

Shortly after his inspection at Seabrook, the ticket collector again started through his three coaches, to announce the arrival of the train in Washington. As he entered the vestibule at the rear of the coach in which decedent and her husband were riding, he found both halves of the double door on the right side of the coach open and swinging free. At this time the train was about a mile beyond the place where decedent's

body was later found. The ticket collector immediately shut the doors and continued on through his coaches. He testified that it was not unusual for him to find an open door on a moving train (J.A. 18A, 26A-28A).

The door which was found open, and through which it was stipulated that the deceased fell, consisted of an upper half and a lower half. The top half is opened by pushing up a handle located about five feet above the floor of the car and then pulling the door back with a latch. The bottom half of the door will not open until the top half is unlatched. When this is done the bottom half opens by turning a handle or knob, not unlike the knob of an ordinary door (J.A. 35A). The ticket collector testified that the two halves of the door were in good working condition, opening smoothly and easily, and were without defects. He also testified that there were handholds for passengers in the vestibule about five feet above the floor level and that a sign in the vestibule warned passengers to keep off the platform while the train was in motion (J.A. 33A-36A).

Petitioner testified that his wife had ridden many times before on coaches of the same type. He also testified that although the deceased was not a strong woman she was just prior to her death "perfectly capable and normal and healthy" (J.A. 50A).

There was no evidence as to who opened the vestibule door at the rear end of the coach.

There was no evidence as to why the vestibule door at the rear end of the coach was open.

There was no evidence as to how long the vestibule door at the rear end of the coach remained open, except evidence from which it could be deduced that the door could have been open for a period of anywhere from a few seconds to seven or eight minutes.

There was no evidence as to how or why the deceased went through the door except evidence that she went to the rear of the car because she felt very warm and wanted to get some fresh air.

There was no evidence of any jerk, bump, lurch or unusual motion of the train; there was, on the contrary, affirmative proof that the train was operated normally and smoothly.

There was no evidence that the door through which the deceased left the train was defective; there was, on the contrary, affirmative evidence that the door was not defective and that it opened smoothly and easily.

On appeal by respondent, the Court of Appeals held that the District Court had erred in submitting to the jury the issue of whether the railroad was guilty of negligence. The court recognized that respondent owed its passengers "the highest degree of care, consistent with practical operation" (Pet. App. 12a), but concluded that petitioner had not supplied the jury with any evidentiary basis on which it could infer or conclude that the ticket collector had opportunity, consistent with the performance of his other duties, to make further inspection of vestibule doors in the five to nine minutes interval between the inspection at Seabrook and the trip through the coach to announce the train's approach to the station at Washington. The Court rejected the contention of petitioner that "a jury verdict need not necessarily be based on evidence but that it may rest on speculation and conjecture" (Pet. App. 15a). It likewise rejected petitioner's contention that support for such a theory of liability was to be found in the decisions of this Court under the Federal Employers Liability Act. The Court also examined alternative theories of negligence suggested by the peti-

tioner—that the doors were not fully closed at the time of the Seabrook inspection, and that the doors were defective—and found them not only unsupported by any evidence but affirmatively disproved (Pet. App. 19a, 20a). Finally, it rejected the application of the doctrine of *res ipsa loquitur*. One judge dissented.

A petition for rehearing was denied on January 2, 1957. The petition for certiorari was filed on April 1, 1957.

ARGUMENT

There are two principal reasons why the present case is inappropriate for review by this Court. First, it turns entirely on questions of fact. Second, it relates only to the common-law rule of negligence to be applied in the District of Columbia—a rule on which the decision of the Court of Appeals is ordinarily final. Moreover, the decision below is clearly correct.

1. The controlling importance of the facts in the present case is apparent from the statement by the court below of the issues on which it ruled (Pet. App. 8a):

> "The questions before us are whether the evidence was sufficient to permit a reasonable conclusion that the railroad was guilty of specific negligence which proximately caused the death of plaintiff's wife, or, alternatively, whether, under the doctrine of *res ipsa loquitur*, negligence on the part of the railroad may be inferred without specific proof thereof."

Petitioner recognizes that those are the questions at issue. He concedes (Pet. p. 11) that no exception can be taken to the statement of the court below of the nature and extent of the appellate review which is avail-

able in such cases. His complaint, rather, is that the court below gave only "lip service" to the legal principles, because it decided the case without "concentrating on the evidentiary reasonableness of the jury's conclusion" (Pet. p. 11). Presumably this Court is to make the more careful analysis and appraisal of petitioner's evidence. But certainly in a common-law action for negligence where no Federal statute is involved, this Court does not review a decision in order to see whether, on the facts, a case was made out for submission to the jury.

2. We believe, therefore, that even were this a diversity jurisdiction case which came to this Court from a Court of Appeals other than that for the District of Columbia, there would be no basis for a second appellate review. Here, however, there is an additional reason why the writ should not be granted. In this case the court below acted in its capacity as the highest court of the District of Columbia, declaring the common law of negligence for that jurisdiction. When the Court of Appeals for the District of Columbia acts in that capacity, it speaks much as does the highest court of a State. This Court "will not ordinarily review decisions of [the court below] which * * * declare the common law of the District." *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285. The rule is the same in criminal matters. *Fisher* v. *United States,* 328 U.S. 463, 476; *Griffin* v. *United States,* 336 U.S. 704, 717.

Petitioner, however, seeks to invoke a narrow exemption to this rule—that where the decision of the District of Columbia Court of Appeals has significance beyond the confines of the District, review by this Court may be appropriate. The *Del Vecchio* case, in which the rule is stated, itself illustrates the exception. In that

case this Court reviewed, and reversed, an interpretation by the court below of the Longshoremen's and Harbor Workers' Act, which was national in scope, because "a decision with respect to its enforcement constitutes a precedent of general application." 296 U.S. at p. 285. See also *United States* v. *Beach*, 324 U.S. 193 (Mann Act).

The exception has no application here. In his attempt to demonstrate that the decision below is a "precedent of general application" petitioner relies only on the fact that the court below in its opinion refers to and comments on decisions of this Court under the Federal Employers Liability Act. Petitioner had cited those opinions as analogies which lent support to his contention that a jury verdict in a negligence case may rest entirely on speculation and conjecture. The court indicated that the decisions might have "helpful application" (Pet. App. 18a), but disagreed with petitioner as to what they held. The court below did not, and could not, "hold", as petitioner states (pp. 8, 9), anything concerning the Federal Employers Liability Act. It could render no decision applying or interpreting that Act because no action grounded on that Act was before it. There is simply no basis for petitioner's assertion that, as in the *Del Vecchio* case, the court below "has applied to the District a statute national in scope" (Pet. p. 9). What petitioner really seeks is a review by this Court of certain statements in the opinion below, rather than the judgment itself.

3. Moreover, both the decision below and the court's interpretation of the decisions construing the Federal Employers Liability Act decisions are correct. It should suffice to point out that there are numerous appellate decisions relating to claims based upon injuries

or death caused by a fall of a passenger through an open door of a moving train, and in no case has there been a holding of negligence on the part of the railroad where, as here, the sum and total of the evidence showed only the existence of an open door through which the passenger fell. Regardless of the theory adopted by the plaintiff, the courts which have been confronted by evidence of the nature presented by petitioner have refused to hold the railroad liable because such a holding necessarily would be the product of speculation and guesswork. See *Norfolk & W. Ry. Co.* v. *Estepp,* 204 F. 2d 880 (6th Cir. 1953); *Dolan* v. *Boston & Maine R.R.,* 105 N.E. 2d 376 (1952); *Brott* v. *Texas & Pac. Ry. Co.,* 35 So. 2d 801 (La. App. 1948); *Cannon* v. *Louisville & N.R. Co.,* 252 Ala. 571, 42 So. 2d 340 (1949); *Wright* v. *Central R. Co. of New Jersey,* 124 N.J.L. 113, 11 A 2d 20 (1940); *Maher* v. *Boston & A. R. Co.,* 304 Mass. 641, 24 N.E. 2d 513 (1939); *Holland* v. *Boston & M. R.R.,* 279 Mass. 342, 181 N.E. 217 (1932); *Scott* v. *New York Central R. Co.,* 216 App. Div. 623, 216 N.Y.S. 163 (1926); *Brown* v. *Union Pac. R. Co.,* 81 Kan. 701, 106 Pac. 1001 (1910); *Hart* v. *St. Louis & S. F. R. Co.,* 80 Kan. 699, 102 Pac. 1101 (1909).

So far as concerns the Federal Employers Liability Act, it need only be pointed out that in *Lavender* v. *Kurn,* 327 U.S. 645, the very portion of the opinion which is quoted by petitioner (Pet. p. 10) shows that there must be an "evidentiary basis for the jury's verdict." In the present case a jury verdict would not merely "involve" speculation and conjecture, as in the *Lavender* case; speculation, conjecture and guesswork would be its only basis. There simply was no proof of respondent's negligence, and no evidentiary basis for a jury verdict.

CONCLUSION

We submit, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

HUGH B. COX,
JAMES H. MCGLOTHLIN,
JAMES C. MCKAY,
701 Union Trust Building,
Washington 5, D. C.,
Counsel for Respondent.

APRIL 1957.

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